

The Right Honourable HENRY Viscount IRWIN, Appellant.

WILLIAM SIMPSON, THOMAS MORRIS, THOMAS HILL, EDWARD FORSTER, RICHARD MIDDLEBROOKE, WILLIAM MIDDLEBROOKE, THOMAS MIDDLEBROOKE, and SAMUEL MAGGOT, Respondents.

THE RESPONDENTS CASE.

KING Charles the First being seized in Fee, in Right of his Crown of England, of and in the Lordship or Manor of *Hatfield*, and of the Chace called *Hatfield Chace* and *Ditch Marsh*, with the Appurtenances, and of divers Waste Grounds and Commons to the said Lordship or Manor belonging, or thereunto near adjoining, in the County of *York*, great Part whereof was then sub- ject to be drowned with Water, so that little or no Benefit could be made thereof without draining the same; thereupon by Articles of Agreement, dated the 24th March, in the second Year of his Reign, made between his said Majesty of the one Part, and *Cornelius Vermuyden* Esquire, afterwards Sir *Cornelius Vermuyden*, Knight, of the other Part; the said Sir *Cornelius Vermuyden* undertook to drain the said drowned Grounds, so as to make the same fit for Tillage or Pasture, and to keep them for ever in such Condition; and in Consideration thereof his said Majesty agreed, that the said Sir *Cornelius Vermuyden*, his Heirs and Assigns, or such other Persons as he should appoint, their Heirs and Assigns, should have the full equal third Part of all the said drowned Grounds; and that his Majesty, upon gaining thereof, would grant the said third Part to the said Sir *Cornelius*, and his Heirs and Assigns, or to such other Persons as afore said, to be holden of his Majesty, his Heirs and Successors, as of his Manor of *East Greenwich*, in the County of *Kent*, in free and common Soccage, and taking Notice, That the Tenants of the said Manor did claim Common of Pasture in the Lands so to be drained as afore said; his Majesty agreed, that a Commission should issue, under the Great Seal, to certain Commissioners to treat and agree with the Persons claiming Common concerning the said Common, and claim to the same.

Sir *Cornelius Vermuyden* having drained the Wastes, his Majesty conveyed the third Part thereof to him, and his Heirs and Assigns; and his Majesty, in Pursuance of the Articles, granted divers Commissions under the Great Seal, one whereof was directed to *William Viscount Ayre*, *John Lord Savilla*, and others, to treat and agree with the Tenants and Inhabitants of all the Townships, Parishes, and Precincts, in and adjoining to the said Wastes and surrounded Grounds, who claimed Right of Common in the same, touching what Part of the Commons to be improved, they would accept in Satisfaction of their Right and Title to the Residue of the said Wastes and Commonable Grounds; which Commissioners agreed with the greater Part of the said Tenants and Inhabitants concerning the same, and allotted and set out to them several Parcels of Grounds and Wastes, to be by them held and enjoyed in Severalty, divided from the other two Parts thereof.

Sir *Cornelius* having afterwards purchased the Manor of *Hatfield* of his Majesty, and the Residue of the Waste and surrounded Grounds; divers Controversies arose between him and his Assigns of several Parts of the said Manor of *Hatfield* of the one Part, and the Tenants and Inhabitants of the said Manor, and of the Towns of *Hatfield*, *Dunstons*, *Woodhouse*, *Tudworth*, *Tborne*, *Sykehouse*, *Fisblake*, and *Stainsforth*, in the said County, on the other Part; as well concerning their Copyholds within the said Manor and Towns, as their Demands of further perfecting the Work of draining the Grounds, and the Proportions and Allotments claimed to be due to the said Inhabitants, and securing their Grounds from future Damage by Pre- sence of Draining: And diverse Complaints being made before the Lords of his Majesty's most Honourable Privy Council thereof; the same were, in June 1630, referred to *Thomas Viscount Wentworth* and others, who, in September following, met there and viewed the Premises, and heard the Parties, and made an Award in Writing between them, to which some Exceptions being taken in some few Points thereof, further Differences arose between the said Parties; but, in November following, they compromised the Matter among themselves, and made a mutual and final Agreement, touching the Parts of the Award to be performed by Sir *Cornelius*.

In Order that the Tenants and Inhabitants might be decreed to stand to their Parts of the Award and further Agreement on their Behalf to be observed; Sir *Cornelius* exhibited his Bill, in his Majesty's Court of *Exchequer* at *Westminster*, against *Robert Portington*, and the several other Persons therein named, as Tenants and Inhabitants of the said Manor of *Hatfield*; to which Bill the Defendants appeared and put in their Answer, and confessed the Agreement and the several Articles of the Award in the Bill expressed, and consented to and allowed of such Parts thereof, and such further Agree- ments as were in the Bill mentioned and consented to have the same decreed; and to the End that Sir *Cornelius* might be also decreed to perform his Part of the said Award and Agreement, *Henry Lee* and the said *Robert Portington*, and divers of the Tenants and Inhabitants of the said Manor and of the said Towns, Villages, and Hamlets, exhibited their Bill, in the same Court, against Sir *Cornelius Vermuyden*, who ap- peared to the said Bill, and put in his Answer, and submitted, that the Award and the further Agreements might be decreed to be performed by all Parties.

The Causes came on to be heard on the 30th Day of the same November; and thereupon the Court or- dered that the Parts of the said Award and the further Agreements should be set down as they were agreed to on each Side; and the same were accordingly set down (amongst other Things) as follows; to wit, That the

the Tenants, their Heirs and Assigns, should have their Turf Moors, with all the Profits thereunto belonging, throughout the Waste of Turbary in such Manner and Form as they usually thencefore had, and their Copyhold Lands there without Admeasurement; and that there should be sufficient Ways left to the Moors for Carriage; and that those who should come to build or dwell upon the Ground of Sir Cornelius, his Heirs or Assigns, were only to have Liberty to cut Turf on 1000 Acres of Turf Moor towards *Growth*, and 500 Acres towards *Sandtoft*, to be set out by Metes and Bounds; and the Turbary, called the *Lords Moors*, were likewise referred to Sir Cornelius and his Assigns; but Sir Cornelius and the new Inhabitants were to take Turf in these Places only for their own Burning, and not for Sale; and the Tenants of the Manor, and the Members thereof, should have unto them and their Heirs, and such Persons and their Heirs as they should appoint, their former Allotments for their Common confirmed unto them according as they were set out by the first Commissioners the said Lord *Saville* and others, the 14th of March 1627, with an Addition of 200 Acres more in *Ditch Marsh* and 403 Acres of Land in *Ferne Carr*, to be assured unto the Tenants in exchange for 403 Acres in *Westmore*. All which Parcels of Ground allotted, and to be allotted and exchanged with the Tenants, should be drained and so kept according to the Articles made between his Majesty and Sir Cornelius Vermuyden; and that Sir Cornelius and his Heirs, upon Request, should convey, or cause to be conveyed, unto such Feoffees, and their Heirs, as the Tenants, or the major Part of them should nominate, such Part of the Moors, not holden by Copy of Court Roll and other Grounds within the said Manor as were allotted, to and for the Tenants to be holden in free and common Soccage; and that the Tenants should cause *Ditch Marsh* to be surveyed, so as it might appear, that they should have a full Moiety thereof, and 200 Acres more, and that the same should be set forth by the Referees, or any such two of them as aforesaid; so as it might lie conveniently for *Sykehouse* and *Fishlake*, as well as for *Thorne*, wherein Regard should be had to accommodate Sir Cornelius and his Assigns, with Conveniences, as well for any new Draining to be made therein, as otherwise, without Prejudice unto the Tenants.

That the said Tenants and Inhabitants should have all Lanes, Ways, and Passages to continue to them, their Heirs, and Assigns in Common as formerly they had, and that they should not be charged with Payment of any Toll for Passage through the Lock, or any other Passage by Water or by Land; and that Sir Cornelius, his Heirs and Assigns, should cause all their Grounds to be sufficiently fenced and inclosed against the Allotments of the Tenants; and the further Demands of the said Tenants assented unto by the said Sir Cornelius not mentioned in the said Award, were (among other Things) as follows; to wit, That neither the said Sir Cornelius and his Tenants of the two Parts improved, nor their Heirs or Assigns, should have any Common in the third Part allotted and set out for the Use of the Tenants and Commoners; and that the Tenants and Inhabitants of the several Towns, Villages, and Places aforesaid, their Heirs and Assigns should have free Liberty to dig Clods, Earth, and Gravel in and upon the said Highways and Lanes, in Places fit and convenient, for their necessary Uses; and that the said Sir Cornelius and his Heirs should convey and assure unto the said Tenants and Inhabitants, their Heirs and Assigns, one Parcel of Marsh Ground, called *Bramwith Marsh*, over and above the several Parcels of Marsh Ground allotted unto them by the Certificate of the said Lord *Saville* and others; and that the said Sir Cornelius and his Heirs, and his and their Tenants, and Farmers, of such Copyhold Tenements as he had lately purchased from *Zanquer*, one of the Daughters of the said Viscount *Ayre*, should enjoy Common of Pasture and Turbary, within the said Wastes and Moors allotted unto the said Tenants, according to the Custom of the Manor: And it was further agreed on both Sides, that according to the Certificate of the said Viscount *Ayre* and others, the said Tenants should have and enjoy these Parcels of Commons following; to wit, *The Westmore* containing 893 Acres, the *Lings* containing 210 Acres, *Woolfree Carr*, *Brickbill Carr*, and *Halehill Carr*, containing 347 Acres, *Remple Carr* 84 Acres, the *Clowns* 467 Acres, *East Tramlyngs* 202 Acres, *Brereham* and *Kirton Carr*, 380 Acres, *Bramwith Marsh* 35 Acres, *Burgarr* and *Hatfield Meere* 130 Acres, *Hatfield Hills* 66 Acres, a Peice of Ground, called the *Common*, the further Side of the Water, 65 Acres, the *West Nabb* 138 Acres, *Kirk Town Nabb* 15 Acres, the Moiety of *Dykes Marsh*, and 200 Acres over: All which said Parcels of Ground the said Tenants and Inhabitants were, by the said Certificate, to hold to them and their several Heirs in Lieu and Recompence of their several Claims of Common in all the Rest of the said Wastes and Commonable Grounds; and thereupon afterwards, on the 30th Day of the same November, the said Court decreed in the Presence of the Council and Parties on both Sides, and with their mutual Consent, that the Parts of the said Award and Agreements before particularly expressed, and the said Certificate of the said Lord *Saville* and others, and every Part thereof (except as in the said Decree excepted) should from thenceforth be observed and performed by the said Parties; and that as well the said Sir Cornelius, and his Heirs and Assigns, as the said Tenants and Inhabitants, and all other the Tenants and Inhabitants of the several Towns, Villages, and Hamlets that then were, and that thereafter for the Time being should be, and their Heirs and Assigns should for ever thereafter be bound to observe and perform the said Parts of the said Award and Agreements by Virtue of the said Decree.

15 July 1633.
Feoffment.

Afterwards by Indenture of Feoffment dated the 15th Day of July 1633, duly executed with Livery of Seizin, and made between the said Sir Cornelius Vermuyden, and John Gibbon, Esquire, of the one Part, and the said Henry Lee, Roger Portington, and several others therein named, Tenants of the said Manor, of the other Part, reciting the said Commission so granted to the said Viscount *Ayre*, and others, and the Allotment by them made as aforesaid; and the said Award so made by the said Viscount *Wentworth*, and other such Commissioners; and that his Majesty had granted to the said Sir Cornelius Vermuyden, the said Lordship or Manor of *Hatfield*, with all the Waste and Commons thereto belonging; and that the said John Gibbon was lately become interested in the said Lordship under the said Sir Cornelius. It is witnessed, that the said Sir Cornelius, and John Gibbon, granted, bargained, aliened, sold, enfeoffed, and confirmed unto the said Henry Lee, Roger Portington, and others, their Heirs and Assigns for ever, all those Parcels of Ground before mentioned, as the same were allotted to the Tenants, and set forth as aforesaid, with the Appurtenances and all Commons, and Turf, Moors, Rights, Profits, Privileges, Emoluments, and Commodities to the said Premises, or to any the Messuages, Lands, or Hereditaments of any the said Tenants belonging; and all the Right, Title, Claim, Interest, Property and Demand of the said Sir Cornelius Vermuyden and John Gibbon, or either of them, of, in and to the same, "To hold, to them, their Heirs and Assigns for ever, to the only proper Use and Behoof of them, their Heirs and Assigns for ever. Nevertheless upon the special Trust and Confidence, and for the sole Benefit, Profit and Commodity of themselves and their Heirs, and of all and singular other the Tenants and Inhabitants of *Hatfield*, *Thorne*, *Dunscroft*, *Stainforth*, *Fishlake* and *Sykehouse*, and of all other the Tenants and Inhabitants of, and "within

“within the said Manor or Lordship of *Hatfield*, and of every of them severally and respectively, to use and enjoy the same and every Part and Parcel thereof as formerly they had done or been accustomed to do, with Covenants on the Part of *Sir Cornelius and Gibbon*, that the Premises were free from former Bargains, Sales, Gifts, Grants, Jointures, Dowers, Statutes, Judgments, Intails, Rents, and all other Incumbrances, and for farther Assurance, whether by Fine, Feoffment, Deed inrolled or Recovery, or other Assurances, with Warranty against *Sir Cornelius and John Gibbon*, and their Heirs, and all claiming by, from or under them.”

In pursuance of the Award, Agreements, Decrees and Feoffment, the Tenants and Inhabitants of the said several Towns within the said Manor of *Hatfield*, have ever since till lately, quietly and without any Interruption held and enjoyed, all the said several Lands as aforesaid, allotted and conveyed to them, and their Heirs, or to the Use of them and their Heirs as aforesaid, together with all Ways, Easements and Profits thereto belonging; and also the Navigation up and down the River *Dunn*, within the said Manor, and without paying any Toll; and also haling and towing Paths there, up and down the said River, and fixing and mooring their Vessels and Ships to the Banks of the said River there, without Interruption till lately, and in the same Manner, as to the present River *Dunn*, as to the old River *Dunn*, in all Respects.

However the Tenants of the Manor of *Hatfield*, being greatly interrupted and disturbed by the Right Honourable *Arthur Lord Viscount Irwin*, and his Agents and Tenants, in the Enjoyment of the Lands allotted, and afterwards conveyed to them, or for their Use; and the Navigation within the Manor, and other Easements and Privileges which they were entitled to, and several Actions of Trespass having been brought against several of the Respondents and others, for Matters done in the Use and Exercise of their Rights, and the Tenants not being able to produce the said Indenture of Feoffment, (though one Part thereof was then in the Hands of *Thomas Canby*, now deceased, then one of the Tenants of the said Manor, in Trust for himself, and the other Tenants and Inhabitants of the said Manor, and then the Steward or Agent of the said *Arthur Lord Irwin*, which he refused to produce, or to permit the Defendants in the Action at Law, to have the Use or Benefit of.)

The now Respondents and several others then Tenants and Inhabitants of the said Manor of *Hatfield*, on the Behalf of themselves, and other the Tenants, Freeholders, and Copyholders, and Inhabitants of the said Towns of *Stainforth, Hatfield, Fishlake* and *Thorne*, within the said Manor of *Hatfield*, were compelled to bring their original Bill of Complaint in his Majesty's Court of Exchequer at *Westminster*, against *Lord Viscount Irwin, Thomas Canby*, and *Robert Jennings*, thereby stating the several Matters aforesaid; and thereby praying, that the former Decree might be carried into Execution, and that they, and the other Tenants and Inhabitants of the said several Towns within the said Manor, might be quieted in the Enjoyment of the several Lands allotted and conveyed to, and to the Use of the Tenants and Inhabitants of the said Manor as aforesaid, and of the Navigation up and down the said River *Dunn*, within the said Manor, together with all other Ways, Easements, Privileges and Profits whatsoever allotted to the Tenants and Inhabitants of the said Manor, by or under the said Agreements and Decree according to the true Meaning thereof, and for an Injunction in the mean Time to stay the Proceedings at Law.

To this Bill, *Arthur late Lord Viscount Irwin*, and the other Defendants appeared, and put in several Answers; and the said *Lord Irwin*, by his Answers (amongst other Things) insisted, that notwithstanding the Award, Agreements, Decree and Feoffment, he as Lord of the Manor was seized of and intitled to the Soil and Freehold of all the Lands allotted and conveyed to, or in Trust for the Tenants and Inhabitants; and that they were only intitled to the Herbage thereof, and to depasture the same; and also that several Parts of the Lands claimed by the Bill, were not really allotted as aforesaid to the Tenants and Inhabitants of the Manor; and the Defendant *Canby*, by his Answer admitted, that he had in his Custody one Part of the Deed of Feoffment, and submitted to produce the same at the Hearing; and *Robert Jennings*, as Tenant of *Lord Irwin*, insisted on a Right of Common in Part of the Lands claimed to be allotted to the Tenants.

The Defendants *Arthur Lord Irwin, Thomas Canby*, and *Robert Jennings*, all died, and afterwards a Bill of Revivor and Supplement was exhibited against *Henry Lord Viscount Irwin* now the Appellant, *Mordecai Cutts*, and *John Robinson* and *Mary* his Wife, suggesting the Death of *Arthur Lord Irwin, Thomas Canby*, and *Robert Jennings*, and charging, that the Appellant was Brother and Heir of the said *Arthur Lord Irwin*, and as such was intitled to the said Manor of *Hatfield* with the Appurtenances, and claimed the same Rights; and that *Mordecai Cutts* was the Executor of *Thomas Canby*, and had got into his Custody that Part of the Deed of Feoffment, which was in the Hands of *Thomas Canby*, and refused to produce the same; and that *Mary*, the Wife of *John Robinson*, was the Widow and Administratrix of *Robert Jennings*; and that *John Robinson* and *Mary* his Wife, threatened to proceed at Law, and take out Execution on the Judgment obtained in the Action at Law brought by *Robert Jennings*; the Appellant, and also *Mordecai Cutts*, and *John Robinson* and *Mary* his Wife, appeared to that Bill; and the Appellant by his Answer admitted, that he was the Brother and Heir of *Arthur late Lord Irwin*, and that he claimed to be intitled to the said Manor for his Life, and derived such Title under the Will of his eldest Brother *Edward Macbell*, and that such Title first accrued to him in Remainder after the Death of his elder Brethren *Richard* and *Arthur*, and had heard and did believe, that *Sir Cornelius Vermuyden* was Lord of the said Manor of *Hatfield*, but knew nothing more of the several Matters and Things contained in the Plaintiff's Bill, than what were disclosed, and set forth in the several Answers of the said *Arthur Viscount Irwin*; to which Answers he referred and submitted, that the Complainant's Bill, and the Proceedings had thereupon, should be revived against him; and *Mordecai Cutts* by his Answer admitted, that he had a Part of the Deed of Feoffment, and submitted to produce the same, but admitted that he had refused to produce it, that the Plaintiffs might have the Benefit of it; and all the Defendants submitted, that all the Proceedings should be revived against them, and the same were revived accordingly.

The Cause being at Issue, several Witnesses were examined, and their Depositions published, and afterwards on the 21st Day of *April 1755*, the Cause was heard in the said Court of Exchequer, whereupon it was (amongst other Things) ordered and decreed, that it should be referred to a Trial at Law in a feigned Action to be brought by the then Plaintiffs, now the Respondents, against the then Defendant *Henry Lord Viscount Irwin* now the Appellant, to try the following Issues (to wit) *first*, whether the Ground whereon the

the Turnpike in the Pleadings mentioned was erected, ~~was~~ or was not Part of the Tenants Allotments. *Second*, Whether there was or was not at the Time of erecting the Turnpike, a Common Highway over that Ground. *Third*, Whether there was or was not at the Time aforesaid, a Way for the Tenants over that Ground, where the Turnpike stood from *Stainforth* to a Common Field called *Incroft* or *Kirk Town Nabb* or either, and which of them. *Fourth*, Whether the uninclosed Ground lying on the East Side of the River *Dunn*, and between the River and the great Bank, commonly called the *Participants Bank*, and extending from a Place called *Ealand Lane*, South, to a Place opposite to a Place called *new Went*, North, or any, and what Part thereof, was Part of the Tenants Allotments, which Issues were to be settled by the Deputy Remembrancer of the said Court, in Case the Parties differed therein, and were to be tried by a special Jury of the County of *York*, and the Consideration of Costs, and all further Directions were reserved, till such Trial was had.

Afterwards, the then Plaintiffs waived the first and second Issues, apprehending that by the fourth Issue all the Matters really in Question, and then in Dispute would be tried; and the then Defendants waived the third Issue, and the fourth Issue was settled and directed to be tried.

First and Second Issues waived by the Plaintiffs.

Third Issue waived by the Defendants.
Summer Assizes

1755.
The Fourth Issue tried, and a Verdict for the Respondents.

At the Summer Assizes 1755, the Issue was tried at *York* by a special Jury, and took up above 18 Hours in the Trial; and upon full Evidence, as to the Right of the Soil of the Premises in Question, a Verdict was given for the then Plaintiffs now the Respondents, whereby it was found, that the said uninclosed Piece or Parcel of Ground, and every Part thereof, was Part of the said Lands and Grounds heretofore allotted to, and for the Benefit of the Tenants of the said Manor of *Hatfield*, entitled to Right of Common on the Waste and Commons of the said Manor.

13 Dec. 1755.
Cause came on to be heard on the Equity reserved after the Trial.

16 December.
Further heard.

17 December.
Decree.

On the 13th of December 1755, the Cause came on again to be heard in the Court of Exchequer, and the Deposition of *Robert Laverack* taken in the Cause on the Part of the Defendant, and other Evidence being offered by the Defendant's Counsel to be read to support their Construction, that there was in the Deed of Feoffment, a resulting Trust in the Lord of the said Manor, as to the Soil of the Lands and Grounds, thereby conveyed for the sole Use of the Tenants of the Manor, the Reading of which Deposition and other Evidence being objected to by the then Plaintiff's Counsel, the further hearing of the Cause was adjourned over to the then next Tuesday, (being the 16th of the same December) when the Cause came on again, to be further heard in Court; and on hearing Counsel on both Sides, the Objection was allowed, and a Paper purporting to be a Copy of a Bill said to be filed in the said Court in the Year 1640, between *Perkins* and others, Plaintiffs, and *Ingram*, Defendant, being offered to be read, was rejected; whereupon the Cause was adjourned to be further heard on the then next Day, when the same came on again; and the said Defendant *Lord Irwin*, having by his Counsel insisted, that he as Lord of the Manor had a Right to the Soil of the Lands allotted to the Tenants, the Court over-ruled the same; and thereupon ordered and decreed, that the then Plaintiffs, now the Respondents, and the rest of the Tenants of the said Manor, Freeholders or Copyholders, and their Heirs and Assigns, should during the Life of the said Defendant *Henry Lord Viscount Irwin*, quietly and peaceably hold, use, occupy, and enjoy the said several Lands and Grounds mentioned in the said fourth Issue and Verdict, and every Part thereof, and all other Lands allotted and conveyed to them, or in Trust for them, according to the said Decree of the 30th of November, in the sixth Year of King *Charles* the First, and the said Deed of Feoffment against the then Defendant (now the Appellant) the Lord Viscount *Irwin*, as Lord of the said Manor, and that an Injunction be awarded under the Seal of the said Court to quiet them in the said Enjoyment, and to enjoin the said Defendant, his Agents, Servants, and Workmen, from interrupting or disturbing the same during the said Time; and that the said then Defendant (now the Appellant) should pay to the said then Plaintiffs (now Respondents) their Costs of the said original Bill and Bill of Revivor and Supplement; and the Costs at Law, and in Equity subsequent to the said Bill of Revivor to be taxed by the Deputy Remembrancer of the said Court; and also that the said *Mordecai Cutts* should bring into the said Court the said Deed of Feoffment, and that the same should be enrolled amongst the Records of the said Court; and that the said then Plaintiffs should pay to the said Defendant *Cutts* his Costs of the said Cause to be taxed, so much of which Costs were to be repaid to the said then Plaintiffs, by the said then Defendant the Lord *Irwin*, as were incurred to the Time of the said *Cutts*'s Answer, who was also to pay to the then Plaintiffs (now Respondents) the Costs of the several Motions and Orders for producing the Feoffment, and also that so much of the Bill as related to the Plaintiffs Claim of the Ground, whereon the Turnpike therein mentioned stood, to be Part of the Lands allotted to the Tenants, or to be a Common Highway, be dismissed, with Costs to be taxed to be paid by the said Plaintiffs, to the then Defendant the Lord *Irwin*; and by Consent the said Bill was dismissed as against the said Defendants, *John Robinson* and *Mary* his Wife, but without Costs.

From which Decree *Henry Lord Irwin* hath appealed to your Lordships, and by his Appeal hath made four Objections.

As to such Part of the said Decree, whereby the Objection to the Reading of the Evidence offered on the Part of the Appellant was allowed.

As to such Part of the Decree, as disallowed the Claim of the Appellant, as Lord of the Manor to the Soil of the allotted Commons, and on that Foundation ordered, that the then Plaintiffs, now the Respondents, should hold and enjoy the Lands found in the fourth Issue, and all other Lands allotted to the Tenants according to the Decree and Feoffment against the Appellant, and awarded an Injunction to quiet the Plaintiffs, now Respondents, in the Possession thereof, during the Life of the said Appellant.

As to such Part of the Decree, whereby it is directed, that the Appellant should pay the Respondents the Costs of the original Bill, and the Bill of Revivor, with subsequent Costs at Law, and in Equity.

As to such Part of the Decree, as directs the Appellant to pay so much of the Defendant *Cutts*'s Costs, as were incurred to the Time of the Answer of the Defendant *Canby*, and the Costs of the Motions and Orders about producing the Deeds of Feoffment.

The Respondents humbly apprehend, that there is not any Ground, for the said Objections, or any of them (amongst many others) for the following

REASONS;

R E A S O N S;

Because every Part of the successive Transactions relative to the Improvement of the Waste Grounds and Commons in Question in this Cause, tends to confirm the legal Operation of the Feoffment, and to rebut the resulting Trust of the Ownership of the Soil pretended by the Appellant. When the original Project of draining and improving was first undertaken, the Crown agreed to grant one Third of the Lands as a Recompence to Sir *Cornelius Vermuyden* the Projector; at the same Time, Powers were given to proper Persons to treat with the Tenants and Inhabitants, who claimed Rights of Common, touching what Part of the LANDS, they would accept in Satisfaction of such Right, and Allotments were made accordingly. Upon the Disputes, which arose after the Purchase of the whole Estate by Sir *Cornelius*, an Award was made under a Reference from the Privy Council, and a Decree in the Exchequer, was founded upon that Award, and other subsequent Agreements. From the Terms of that Decree, it is evident, that the former Allotments were confirmed with Additions, and new Exchanges made. The Purchaser is directed to enfeoff Trustees in such Allotments and Exchanges, for the Benefit of the Tenants and their Heirs, in Lieu of all their Claims in the rest of the Waste and Commonable Grounds, to be held of the Lord of the Manor, *in free and common Socage*. Upon the 15th July 1633, the Feoffment is accordingly made to the Feoffees and their Heirs, to the Use of them and their Heirs, upon special Trust and Confidence, and for the **SOLE BENEFIT, PROFIT AND COMMODITY OF THEMSELVES, AND THE OTHER TENANTS AND INHABITANTS.**

The manifest Intent of the Feoffment was to confirm and effectuate an Exchange of the Right of Common, in two Thirds of the Waste Lands, with the Right of Soil in the remaining one Third. The Tenants had originally a Right of Common over the whole; the Lord had likewise a Right in every Part of the Soil. On the one Hand, the Lord was encouraged to drain and improve, by being enabled to inclose free from the Right of Common; on the other Hand it was advantageous to the Tenants, to relinquish so large a Proportion of the Waste for the Sake of quietly enjoying one Third of it, improved and drained, under a Conveyance of the absolute Ownership of the Soil, discharged from the Right of the Lord.

If it was the Intent of the Parties to secure only a Right of Common in one Third of the Waste, still liable to the Lord's Right of Ownership in the Soil; the proper Method had been, not for the Lord to enfeoff Trustees for the Tenants in one Third of the Waste, but for the Tenants to have executed Releases of their Right of Common, on two Thirds of it to the Lord, reserving to themselves the free Enjoyment of such Right of Common, as they were accustomed to have, on the remaining Third; or the Court, in Consequence of the Award and Agreements, might have decreed the Lord to hold and enjoy the two Thirds free from any Right of Common or otherwise in the Tenants; and that the Tenants should enjoy their Right of Common in the remaining third Part, exclusive of the Lord. There would be no Occasion in this View for the Solemnity of a Feoffment, and the Interposition of Trustees. If the Soil was not to be absolutely conveyed, the original customary Enjoyment, and the Right of Common in the remaining Third, was a better Title than any new Conveyance from the Lord, subject to be restrained and limited in the Operation of it, by his Words of Grant. The vesting of the entire Property of the Soil in Trustees, as a Trust for the Tenants, was the Object of this Feoffment; because it was the only effectual Method of securing them from future Vexation, as to Pretences of digging the Waste, surcharging the Common, and doing other Acts, which might produce Contests.

The Parol Evidence offered in this Cause to shew Acts of Ownership done, and an Exercise of the Lord's Rights upon the allotted Lands, long since the Time of the Decree and Feoffment, was rejected by the Court; because it is contrary to the Rules of Law, to set up a resulting Trust, by Parol Evidence, where the plain Words of the Deed have disposed of the whole Trust or beneficial Interest in the Land; as it would render all Titles to Estates precarious and insecure.

The Appellant Lord *Irwin* having set up a Defence both in Law and Fact, which could not be supported, and having insisted on a Trial at Law, in which a Verdict went against him, and the Respondents having been put to very great Expences thereby; it is apprehended, that the Court was in some Measure bound to give the Respondents their Costs. For although the giving or refusing Costs is discretionary in Courts of Equity, yet unless there is something very particular in the Case to vary the Rule, Costs always follow the Right.

C. YORKE.

GEO. PERROTT.

Die Martis 5^o Decembris 1758.

Read & Adjudg'd by the Lords Spiritual and Temporal in Parliament assembled, That the said Appeal be and is hereby dismiss'd this House; and the said Decree therein complain'd of be and the same is hereby confirmed. And it is further Order'd, That the Appell^t. do pay or cause to be paid to the Respond^{ts}. the Sum of Sixty Pounds for their Costs in respect of said Appeal.

REASON

AND INHABITANTS.
PROFIT AND COMMODITY OF THEMSELVES, AND THE OTHER INHABITANTS.
Use of them and their heirs, upon special Trust and Confidence, and for the sole benefit
Upon the 25th day of 1813, the Parliament is accordingly enacted to the effect following, to wit:
Waste and Commonable Ground, to be held of the Lord of the Manor, in the County of Devon, and
Exchanges for the Benefit of the Parishes and their Inhabitants, in the County of Devon, and
and new Exchanges made. The Parliament is directed to cause the same to be done, and
the Terms of that Decree, it is evident, that the former Affirmation was made, and was intended
Deduct in the Decree, was founded upon that Award, and the 18th of 1813, was intended to
whole Estate by Sir Charles, an Award was made under a Statute in force at that time, and
and Awards were made accordingly. Upon the Decree, which was made, the 18th of 1813, was intended to
of Common, touching what Part of the 18th of 1813, the Award was made, and the 18th of 1813, was intended to
Powers were given to proper Persons to treat with the Tenants and Inhabitants, and the 18th of 1813, was intended to
Third of the Lands as a Recompense to Sir Charles, and the 18th of 1813, was intended to
original Project of draining and improving what was then under water, the 18th of 1813, was intended to
report the relating Trust of the Ownership of the Soil, created by the 18th of 1813, was intended to
Commons in Question in this Cause, tends to confirm the legal Opinion of the Court, and the 18th of 1813, was intended to
because every Part of the Executive Translation relates to the subject in question, and the 18th of 1813, was intended to

from the Right of the Lord
of the improvement and drained, under a Conveyance of the absolute Ownership of the land, and
Tenants, to recompense to large a Proportion of the Waste for the sake of which, they enjoyed the land
entitled to include free from the Right of Common; on the other hand, it was advantageous to the
every Part of the Soil. On the one hand, the Lord was encouraged to grant a Right of Common over the
Tenants had originally a Right of Common over the whole; the Lord was encouraged to grant a Right of Common
man, in two thirds of the Waste Lands, with the Right of Soil in the other third. The Lord was encouraged to
the manner in which the Resolution was to continue, and effectual, as a Right of Common.

EDWARD
CHARLES
WILLIAM
TOMAS
and SAMUEL

The
To be heard
on
1758

Foster, Riddlebrooke, Middelbrooke, Mindlebrooke, Juel Maggot,

Respondents Case.

at the Bar of the House of Commons

the Day of

1890. FEBRUARY.

THE RESPONDENTS CASE.
 MORRIS, THOMAS HILL,
 EDWARD FORSTER, RI-
 CHARD MIDDLEBROOKE,
 WILLIAM MIDDLEBROOKE,
 THOMAS MIDDLEBROOKE,
 and SAMUEL MAGGOTT,
 Respondents.